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NO.

IN THE

Supreme Court of the United States

October Term, 1981

KENNETH L. McLEOD, D.V.M.

Petitioner,

v.

KENNETH CHILTON, LAWRENCE BECK, ROBERT BOWMAN, DWAYNE DOBSON, DON MARTIN and KENNETH MORRISON, individually and as members of THE STATE OF ARIZONA LIVE STOCK SANITARY BOARD; JOSEPH SAMSILL; WAYNE WIEKHORST, D.V.M.; and THE STATE OF ARIZONA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF ARIZONA DIVISION ONE

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To The Honorable, The Chief Justice, and the Associate Justices of the Supreme Court of the United States:

KENNETH L. McLEOD, D.V.M., the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the State of Arizona, Division One, entered January 27, 1982.

QUESTION PRESENTED

Whether a public employee who is dismissed for reasons likely to harm his reputation and foreclose future employment opportunities loses his right to a hearing where those reasons are made public as a result of his exercising his right to have all proceedings and meetings concerning his dismissal made open to the public.

PARTIES

The parties to this proceeding are those listed in the caption of the case in this Court.

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OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported, and is printed at Appendix A, *infra*, pp. 1a through 21a. The findings of fact, conclusions of law, and order of the Maricopa County Superior Court are not reported but are printed at Appendix B, *infra*, pp. 22a through 25A.

JURISDICTION

The opinion of the Court of Appeals was filed November 10, 1981. A timely petition for rehearing was denied on January 27, 1982 (Appendix C, *infra*, p. 26a), and the Arizona Supreme Court denied a timely petition for review on February 23, 1982 (Appendix D, *infra*, p. 27a The jurisdiction of this Supreme Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

1. U.S. CONS. amend. I, provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. U.S. CONS. amend. XIV, § 1, provides, in part:

". . . No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. A.R.S. § 38-431.01(A) provides:

"All meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings."

4. A.R.S. § 38-431.03 provides, in part:

"A. Upon a public majority vote of the members constituting a quorum, a public body may hold an executive session but only for the following purposes:

1. Discussion or consideration of employment, assignment, appointment, promotion, demotion, salaries, disciplining or resignation of a public officer, appointee or employee of any body, except that with the exception of salary discussions, an officer, appointee or employee may demand that such discussion or consideration occur at a public meeting."

STATEMENT OF THE CASE

For 23 years, Petitioner KENNETH L. McLEOD, D.V.M., served as Chief Veterinary Meat Inspector for the Arizona State Live Stock Sanitary Board. As such, he was in charge of Arizona's meat inspection program, in a position created by statute, A.R.S. § 24-621. He served without difficulty and with adequate job ratings until late June of 1979, when he was told that he had a choice of resigning, taking a demotion, or having "bad charges" made against him. He refused, but instead formally requested the Live Stock Board to hold all discussions about his employment at public open meeting. He has this right under Arizona Law, A.R.S. § 38-431.03(A)(1) (quoted *supra*).

DR. McLEOD was terminated by Board Action on August

22 and August 30, 1979. As part of the proceedings, he was given a dismissal letter charging, *inter alia*, (1) that he had allowed "unwholesome and diseased meat to move to human consumption"; (2) had "a direct conflict of interest" in violation of Arizona law (A.R.S. § 38-503); and, (3) suffered from "incompetence", "neglect of duty", "insubordination" and other similar problems.

Although DR. McLEOD requested a hearing to respond to the charges, he did not receive one.* He therefore filed suit, based, in part, on 42 U.S.C. § 1983. He alleged that the Board had deprived him of his liberty and property without due process of law. See proceedings in Maricopa County, Arizona, cause number C-393927, discussed at Appendix A, p. 5a.

After a hearing on a preliminary injunction, the trial court entered findings of fact and conclusions of law (Appendix B, pp. 22a through 25a, *infra*). The court ordered Dr. McLeod reinstated pending an anticipated personnel board hearing. As part of those proceedings, the trial court specifically found that the allegations behind the dismissal carried "a taint of unethical conduct" and "may be causing injury" to Dr. McLeod's reputation. (Appendix B, p. 24a).

In Opinion filed November 10, 1981, the Arizona Court of Appeals reversed the trial court's order and held that Dr.

---

*Almost a year later the Board did offer Dr. McLeod a "hearing", supposedly to allow him to clear his name. Although that hearing was held, its validity and fairness are at issue in subsequent judicial proceedings. The Board now argues that there can be no judicial review of that hearing, because it need not have been held in the first instance. See proceedings now pending in the Court of Appeals for the State of Arizona, Division One, Cause No. 1 CA-CIV 6018. This "hearing" was never before the court of appeals when it entered the decision which concerns us herein.

McLeod was not entitled to any type of hearing. He was not entitled to a personnel board hearing, the Court held, because he was an "at will" employee. (Appendix A, pp. 10a through 21a).

The court then held that the United States Constitution does not require that Dr. McLeod be given a "due process" hearing. (Appendix A, pp. 18a through 21a). Although the Court of Appeals recognized that a person is entitled to such a hearing "where the dismissal imposed upon the employee a stigma or reputational harm which forecloses further employment opportunities or results in significant damage to the employee's standing in the community", (Appendix A, p. 19a), the court nonetheless found that law inapplicable to Dr. McLeod. The court's reasoning was that Dr. McLeod himself had caused the reasons for the dismissal to be made public:

> "The contents of the [dismissal] letter and the reasons for plaintiff's dismissal were not made public until after plaintiff's *request* that all discussions involving his dismissal be had in public." (Appendix A at p. 20a; emphasis the Court's).

This Opinion was approved by the Arizona Supreme Court on February 23, 1982 when it refused to grant a timely Petition for Review (Appendix D, p. 27a).

Thus, by exercising the right to have his employment discussed at public meeting, Dr. McLeod lost any right he otherwise would have had to a hearing to clear his name.

REASONS FOR GRANTING WRIT

Introduction

This case presents a direct conflict between the right of a

public employee to have a hearing when dismissed for publicized defamatory reasons, with the right of the public to have meetings of its boards held open to scrutiny. As a corollary, this case raises the question of the foundation and constitutional basis of the "Sunshine Laws" that have been promulgated by every state and the United States Congress.

This Court should accept certiorari because the Arizona Court of Appeals has decided important federal questions concerning these matters which should be settled by this Court, and because there is an apparent conflict between two federal courts of appeals on one aspect of this matter.

The Liberty Interest Right To A Hearing

The Court of Appeals rejected Dr. McLeod's plea for a hearing, by saying that it was he who caused the Live Stock Board to publicize the reasons for the termination. This is contrary to the generally accepted rule that Dr. McLeod would have been entitled to such a hearing if the Board had publicized the termination reasons absent Dr. McLeod's request for public meetings.

The right of a public employee to a hearing when dismissed for defamatory reasons has been well established and is grounded on the Liberty Interest afforded under the 14th Amendment of the United States Constitution. As this Court said in *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1972):

> "Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."

This Liberty Interest was further clarified in *Board of Regents v. Roth*, 408 U.S. 564 (1972), where this Court

found that the State, in declining to rehire Teacher Roth:

> "Did not make any charge against him that might seriously damage his standing and associations in the community," (408 U.S. at 573)

nor did the State impose "a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." (408 U.S. at 573).

Subsequent lower court decisions have interpreted the guidelines articulated in *Roth* to require that an employee claiming an infringement of liberty show that the government's action was likely to either seriously harm his standing in the community or foreclose his future opportunities for reemployment. *See, e.g., Weathers v. West Yuma County School District*, 530 F.2d 1335, 1338-39 (10th Cir. 1976); *Sims v. Fox*, 505 F.2d 857, 863 (5th Cir. 1974 [en banc]); *Lipp v. Board of Education*, 470 F.2d 802, 805 (7th Cir. 1972).

Equally well established is the requirement that the State must make its actions public before any Liberty Interest attaches. As recognized in *Bishop v. Wood*, 426 U.S. 341 (1976), an "at will" public employee is not deprived of liberty "when there is no public disclosure of the reasons for the discharge". (426 U.S. at 348). See, also, *Codd v. Velger*, 429 U.S. 624, 628 (1977).

The nature and extent of this "public disclosure' appears nebulous from the few courts that have dealt with the issue. Some courts have held that placing defamatory matter in a personnel file likely to be divulged is sufficient disclosure. *Stevens v. Joint School District No. 1*, 429 F. Supp. 477 (W.D. Wis. 1977); see, also, *Mazaleski v. Trewsdale*, 562 F.2d 701 (D.C. Cir. 1977). Other courts have found this disclosure where a terminated employee is "forced" to cause

the disclosure in the first instance. *Giordano v. Roudebush*, 448 F. Supp. 899, 906 (S.D. Iowa 1977) (doctor "forced" to consent to disclosure to obtain future employment); *Doe v. Anker*, 451 F. Supp. 241, 252 (S.D.N.Y. 1978) (plaintiff "forced to consent to being defamed before his doctor as a condition to obtaining an explanation for his suspension").

The precise issue at bar involves only one aspect of this public disclosure: where the disclosure occurs because the employee requests a public meeting concerning his termination. It appears that this question has been dealt with in only three cases: *Cato v. Collins*, 539 F.2d 656 (8th Cir. 1976); *Dennis v. S & S Consolidated Rural High School District*, 577 F.2d 338 (5th Cir. 1978); and *McLeod v. Chilton*, ___ Ariz. ___, ___ P.2d ___ (App. 1982) (*sub judice*).

Both the 8th Circuit and the Arizona courts have held that disclosure through an open meeting held at an employee's request cannot form the basis for a Liberty Interest hearing:

> "In this case, the record indicates that the reasons for the non-renewal of appellant's contract were not publicized by the board nor incorporated into any employment record. The board informed appellant of the reasons for non-renewal in a confidential letter and did not publicly announce those reasons. It was only at appellant's request that public hearings were held, where the circumstances surrounding and the reasons for non-renewal became public information. Such disclosure of the reasons for nonrenewal at the teacher's request cannot from the basis for an interest in liberty."

539 F.2d at 660; quoted with approval by the Arizona Court of Appeals (Appendix A, p. 20a).

The Fifth Circuit, on the other hand, has ruled that it makes no difference whether the charges are aired at a public meeting held at the request of the terminated employee.

In *Dennis v. S & S Consolidated Rural H.S. District, supra*, teacher Dennis requested his Board of Trustees to meet publicly. Prior to that meeting, Dennis had not been given a list of charges against him or reasons for his non-renewal. The Board met at Dennis' request and aired charges which included drinking. The Fifth Circuit held that Dennis was entitled to a hearing in order to "clear his name". (577 F.2d at 344). Dennis was entitled to a hearing because the charges against him had been made public, regardless of the cause:

> "[I]n [*Ferguson v. Thomas, supra*], we recognized a place for the making of private, though damaging, charges against an employee who elects to depart rather than air them. *Simms v. Fox*, 505 F.2d 857 (5th Cir. 1974) also recognizes, however, that where such public charges are denied and discharge is resisted, they may not be the basis of discharge unless due process has been accorded." (577 F.2d at 341).

Thus, the Fifth Circuit is at odds with the Eighth Circuit as to the significance of an employee's request that the charges be made public with respect to the right of a due process hearing.

The Sunshine Laws

According to both the Arizona Courts and the Eighth Circuit, McLeod lost his right to a "Liberty Interest" hearing by exercising his right to have the charges aired at a public meeting. The problem is that his right to a public meeting is (or should be) a fundamental Constitutional right. As such, he should not be punished for its exercise absent a compelling state interest.

This Court has apparently never considered the nature of the right of the public to require meetings of its boards to be held openly. This may be because of the extensive legislation

codifying the right. Thus, the last twenty years have brought substantial legislative changes with respect to requiring governing bodies to open their meetings to public scrutiny. Every state has now passed some form of "Sunshine Law" as has the United States Congress (see listings in Note, *The "Open Door" Laws: An Appraisal of Open Meeting Legislation in Indiana*, 14 Valp. L. Rev. 295 (1980)

There is no question that these open meeting statutes serve an important purpose:

> "They are instrumental in fostering an informed public, thereby promoting greater citizen participation in the affairs of government and greater understanding of the decisions reached by government. By allowing the public to better oversee government operations, they make the government responsive and responsible. Abuses of the public trust can more readily be discerned and corrected. Accurate and adequate information facilitates constructive criticism of the government, and can assist in improving the quality of the work. By reducing public suspicion and distrust which is bred of excessive secrecy, citizen confidence in government is promoted."

Edelstein, *Openness in Government - a Continuing Era*, 38 Fed. B.J. 95, 96 (1979).

Beyond having significant impact, the right to a public meeting is firmly entrenched in the Constitution. Thus, many commentators have argued for years that the right to require open meetings of public boards is a fundamental right guaranteed by the First Amendment. Cross, *the People's Right To Know*, 124-32 (1953); Thayer, *Legal Control of the Press*, 164-68 (4th Ed. 1962); Parks, *The Open Government Principle: Applying The Right To Know Under The Constitution*, 26 Geo. Wash. L. Rev. 1 (1957); Note, *Access To Official Information: A Neglected Constitutional Right*, 27 Ind. L.J. 209 (1952); Note, *Open Meeting Statutes: The*

Press Fights For The Right To Know, 75 Harv. L. Rev. 1199, 1204 (1962).

As so aptly stated by Cross, *supra*, 132:

> "The public's business is the public's business. The people have the right to know. Freedom of information about public records and proceedings is their just heritage. Citizens must have legal right to investigate and examine the conduct of their affairs. They must have a simple, speedy means of enforcement. These rights must be raised to the highest sanction. The time is ripe. The First Amendment points the way."

There is also some judicial authority, although scant, for the proposition. The California Supreme Court has labeled the right of access to government records a "fundamental" right based on the First Amendment. *Black Panther Party v. Kehoe*, 42 Cal. App. 3d 645, 117 Cal. Rptr. 106 (1974):

> "Access to Government records is doubtless a fundamental interest of citizenship. Legislative and judicial vigor in protecting this interest may have played a role in postponing delineation of a Constitutional right of access. This delineation may await a future clash of demands for disclosure with claims of executive secrecy, both posited on Constitutional grounds."

(42 Cal. App. 3d at 654; 117 Cal. Rptr. at 111). See, also *Pell v. Procunier*, 417 U.S. 817, 839 (1974) (Dissenting opinion).

If this Court allows the Arizona courts and the Eighth Circuit to continue to deny hearings when termination reasons are discussed at requested public meetings, the action will invite a substantial chilling effect on First Amendment rights. Such rulings discourage terminated employees from exercising the fundamental First Amendment right of having board actions open to public scrutiny. Such holdings would also have an effect on the operation of government, since they

encourage closed board meetings.

On the other hand, if an employee does request that proceedings concerning his employment be by way of open meeting, this will allow the administrative agency an opportunity to declare "open season" on that employee's reputation, without fear of reprisal. The board, knowing it will not have to withstand a liberty interest hearing, will be free to defame the terminated employee without scrutiny.

In sum, we believe this Court should address the significance of "Sunshine Laws" viz-a-viz a terminated and defamed public employee's right to a liberty interest hearing. This Court should establish the fundamental basis of the right to open board meetings not only for the good of Dr. McLeod, but also for the good of truth and fairness in the management of our government.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED this 25th day of May, 1982.

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APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

KENNETH L. McLEOD, D.V.M., Plaintiff-Appellee-Appellant, v. KENNETH CHILTON, LAWRENCE BECK, ROBERT BOWMAN, DWAYNE DOBSON, DON MARTIN and KENNETH MORRISON, individually and as members of the STATE OF ARIZONA LIVESTOCK SANITARY BOARD; JOSEPH SAMSILL; WAYNE WIEKHORST, D.V.M.; and THE STATE OF ARIZONA, Defendants-Appellants-Appellees.	(Filed: Nov. 10, 1981) 1 CA-CIV 5117 1 CA-CIV 5216 1 CA-CIV 5481 1 CA-CIV 5761 (Consolidated) DEPARTMENT A OPINION

An Appeal from the Superior Court of Maricopa County
Cause No. C-393927
Cause No. C-408462
(Consolidated)

The Honorable David J. Perry, Judge

AFFIRMED IN PART; REVERSED IN PART

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WREN, Chief Judge

Plaintiff Kenneth L. McLeod, D.V.M., was dismissed by the State Livestock Sanitary Board (Livestock Board) from his

position as Chief Veterinary Meat Inspector, a state position created by A.R.S. § 24-621. These appeals represent the culmination of the morass of litigation commenced by plaintiff as a result of that dismissal.

The central issues presented to us are:

(1) Whether the Livestock Board violated Arizona's "open meeting" laws, A.R.S. §§ 38-431 through 38-431.09, thus rendering the resolution to dismiss plaintiff "null and void" under A.R.S. § 38-431.05;

(2) Whether plaintiff had a "property interest" or a "liberty interest" in his employment sufficient to entitle him under the due process clause of the fourteenth amendment, to a "*pretermination*" hearing;

(3) Whether plaintiff is entitled to judicial review of the Livestock Board's decision to terminate him, either indirectly through the procedures governing appeals to the State Personnel Board (Personnel Board), A.R.S. §§ 41-781 through 41-785, or directly pursuant to the Administrative Review Act, A.R.S. §§ 12-901 through 12-914.

These issues arise through appeals, which have been consolidated by order of this court, from four separate superior court orders. Specifically, the Livestock Board appeals from:

(1) A preliminary injunction issued November 9, 1979, directing the Livestock Board to reinstate plaintiff as the chief veterinary meat inspector until a hearing was held before the Personnel Board;

(2) A second preliminary injunction issued on January 18, 1980, again directing the Livestock Board to reinstate plaintiff pending the Personnel Board hearing, and additionally awarding plaintiff back wages from November 9, 1979;1/

1/ *See* page 3a.

and

(3) A superior court order determining that the Personnel Board had jurisdiction to hear plaintiff's case entered pursuant to an appeal to the superior court under A.R.S. § 41-785, which provides for appeals to superior court from Personnel Board decisions, after the Personnel Board had determined it was without jurisdiction to hear the case on its merits;

and plaintiff appeals from:

(4) A superior court order dismissing plaintiff's claim based on the Administrative Review Act, A.R.S. § 12-901 *et seq.*, for lack of jurisdiction.

The facts and circumstances surrounding the issuance of these orders are as follows. The Livestock Board is a state agency responsible for "protect[ing]" the public from diseased and unwholesome meat products." A.R.S. § 24-104 (A)(1). The position of "chief veterinary meat inspector" is created by A.R.S. § 24-621. The chief inspector is to be appointed by the Livestock Board and "shall serve at the pleasure of the board." A.R.S. § 24-621(A). Plaintiff had served as chief inspector for some twenty-three years prior to his dismissal.

Sometime during the last years of plaintiff's service, the Livestock Board became concerned with what it considered

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1/ The Livestock Board had already appealed the November 9, 1979 injunction to this court, challenging its validity for, among other things, the failure to have a bond set and posted pursuant to rule 65(c), Arizona Rules of Civil Procedure. This court, upon plaintiff's application, revested jurisdiction in the superior court for the limited purpose of permitting consideration by that court of an application by plaintiff for the setting and posting of security. The January 1980 injunction issued as a result of this superior court proceeding. The validity and effect of the two injunctions need not be discussed, however, since it is our determination that they were based upon an incorrect assumption, *i.e.*, that the Personnel Board had jurisdiction to hear the plaintiff's case.

plaintiff's lax administration of the meat inspection program. In early June, 1979, Joe Samsill, the Livestock Board's Assistant Director of Administrative Services, met with plaintiff, discussed with him the Livestock Board's dissatisfaction with his present administrative procedures, and set a deadline in late June for shoring up the program's administration. On June 29, 1979, Samsill informed plaintiff that the Livestock Board still considered plaintiff's work as unsatisfactory, and offered him the option of accepting a voluntary demotion, being involuntarily demoted, or being dismissed. Plaintiff refused to accept a demotion.

Consequently, on August 22, 1979, the Livestock Board met and considered plaintiff's employment. Plaintiff had requested, prior to the meeting and in writing, pursuant to A.R.S. § 38-431.03, that all discussion concerning his employment be held in open session. After some discussion of plaintiff's situation in open session, the Livestock Board voted to continue discussing plaintiff's employment in "executive" session; that is, not before the public. A.R.S. § 38-431.03. Plaintiff objected to this procedure. Following the "executive" session, the Livestock Board returned to open session, where it voted to direct Samsill, now Acting Director for the Board, to request plaintiff to resign effective August 24, 1979, or, if plaintiff did not tender his resignation by that date, to dismiss him

Plaintiff indicated he would not resign, and on August 23, 1979, received a nine-page dismissal letter, effective August 24, prepared and signed by Samsill. The letter opened by stating some general grounds regarding the dismissal, then outlined several specific situations where the Board felt plaintiff had not satisfactorily performed his duties as chief inspector. The particular dissatisfaction with

plaintiff's performance in the bulk of these outlined situations involved plaintiff's reluctance to impose sanctions upon certain meat processing and packaging installations for their continuing disregard of sanitary standards. One situation involved an alleged conflict of interest. The letter closed by advising plaintiff of his right to appeal his dismissal to the Personnel Board. *See* A.R.S. § 41-768.

Upon receipt of the dismissal letter, plaintiff instituted a suit in two counts in superior court. Count One sought to nullify the August 22, 1979 Livestock Board action ordering his dismissal on the grounds that the "executive" session was held in violation of the Arizona open meeting laws, A.R.S. § 38-431 *et seq.*, and thus the Board's actions taken pursuant to that session were "null and void." A.R.S. § 38-431.05. Count One also sought injunctive relief from any further attempt to terminate plaintiff pursuant to any Livestock Board resolution entered at the August 22 meeting. Count Two sought both damages and injunctive relief, based on 42 U.S.C.A. § 1983, alleging the Livestock Board had deprived the plaintiff of liberty or property without due process of law by not affording him a predetermination hearing. Additionally, Count Two prayed for an order restraining the Livestock Board from taking any further steps in connection with its plan to terminate plaintiff until a Personnel Board hearing was held.

While these matters were pending, the Livestock Board, on August 30, held a second meeting, this time completely in open session, in an attempt to cure both the alleged open meeting violation and the alleged deprivation of due process under 42 U.S.C.A. § 1983. At this meeting, the Board again voted to order plaintiff's dismissal. Shortly thereafter, plaintiff amended his complaint by adding a

third count based on the Administrative Review Act, A.R.S. § 12-901 *et seq.*, seeking judicial review of the procedures surrounding his dismissal. Plaintiff also filed a timely appeal with the Personnel Board. *See* A.R.S. § 41-768.

Based on the complaint filed in superior court, Judge Michael E. Bradford issued the November 9, 1979 injunction ordering plaintiff's reinstatement pending a Personnel Board hearing. This injunctive order was apparently based on the court's feeling that a *prima facie* "open meeting" violation had occurred, and that the August 30 Livestock Board meeting had not cured that defect. It is unclear what portion, if any, of the relief granted by the court was premised on plaintiff's due process request for a pre-termination hearing. The court's conclusion of law indicates that reinstatement was based on the open meeting violation. However, the court's findings of fact numbers 6 and 7 state:

> 6. The dismissal of Dr. McLeod occurred in an atmosphere infused with allegations of scandal directed against the Livestock Sanitary Board and *carries a taint of unethical conduct on Dr. McLeod's part.*
>
> 7. The charges against Dr. McLeod and the attendant dismissal from his position are causing him a loss of pay and *may be causing injury to his reputation.* (emphasis added)

It further appears that plaintiff's claim under the Administrative Review Act was not considered or ruled upon at this time. The January 18, 1980 injunction was based on the same findings of fact and conclusions of law. The Livestock Board, as noted above, appealed from both orders.

While preparing for the Personnel Board hearing, the

Livestock Board[2/] discovered the language in A.R.S. § 24-621(A) which provides:

> There is created the office of chief veterinary meat inspector. The [Livestock] board shall appoint [the chief inspector] . . . . [*H*]*e shall serve at the pleasure of the board.* (emphasis added)

The Livestock Board then filed a motion to dismiss the Personnel Board action, contending the above emphasized language – "shall serve at the pleasure of the board" – exempted plaintiff from the operation of the State Merit System[3/] under A.R.S. § 41-771(12), set forth hereunder, and thus the Personnel Board was without jurisdiction over the matter. The Personnel Board agreed, and dismissed the case. Plaintiff appealed the dismissal to the superior court under A.R.S. § 41-785, and the superior court, exercising appellate jurisdiction, determined the Personnel Board did have jurisdiction, and remanded the matter back to the Personnel Board with instructions to proceed with the hearing. This was the third order appealed from by the Livestock Board.

2/ The Arizona Attorney General's Office appeared on behalf of the Livestock Board, and on behalf of the State, which had also been named in the suit. References to all defendants will continue to be made in the name of the Livestock Board only.

3/ The "State Merit System" is comprised of Articles 5 and 6 of Title 41 of the Arizona Revised Statutes (A.R.S. §§ 41-761 through 41-785), and, generally speaking, provides that non-exempt state employees may only be dismissed "for cause" after having served a probationary period. The Personnel Board is an integral part of the Merit System, being the mechanism through which non-exempt state employees are entitled to challenge the propriety of the termination decisions of their state agency employer as to whether or not the dismissal was properly "for cause." The Merit System will be interchangeably referred to throughout the remainder of this opinion as the "merit system" or the "Personnel Board statutes."

In the meantime, when the Personnel Board denied jurisdiction, plaintiff instituted a second action in superior court based on the Administrative Review Act, *supra*. The Livestock Board then brought motions to dismiss for lack of jurisdiction over both this second motion *and* the original Administrative Review Act claim, count three of plaintiff's original complaint as amended. The motions were considered by two different divisions of the Maricopa County Superior Court. The Honorable Morris L. Rozar (Division 7) denied the motion. The Honorable David J. Perry (Division 18) granted the motion. Plaintiff, as above indicated, appealed from the order granting the motion to dismiss.

OPEN MEETING VIOLATION

We first consider the alleged "open meeting" violation. We note at the outset that plaintiff contends the preliminary injunctions, entered in November 1979 and January 1980, respectively, were not based on an "open meeting" violation, but rather on his due process contention of not having been afforded a pretermination hearing. We will, nevertheless, briefly address the issue since it is appropriate to a complete disposition of this appeal.

A.R.S. § 38-431.03 states in part:

> A. Upon a public majority vote of the members constituting a quorum, a public body may hold an executive session but only for the following purposes:
>
> 1. Discussion or consideration of employment, assignment, appointment, promotion, demotion, salaries, disciplining or resignation of a public officer, appointee or employee of any public body, except that with the exception of salary discussions, an officer, appointee or employee may demand that such discussion or consideration occur at a public meeting.

A.R.S. § 38-431.05 states:

> All business transacted by any public body during a meeting held in violation of the provisions of this article shall be null and void.

It is admitted by the Livestock Board that an executive session was held at the August 22 board meeting, contrary to the request of plaintiff and thus in violation of A.R.S. § 38-431.03. The Board contends, however, that the August 30 meeting, wherein the Board voted and readopted its plan to dismiss plaintiff, cured that violation. The trial court disagreed that a subsequent reaffirmation of a matter previously considered in executive session could cure the defect. Since the trial court's ruling on the issue, however, this court has found to the contrary. In *Cooper v. Arizona Western College District Governing Board*, 125 Ariz. 463, 610 P.2d 465 (App. 1980), we stated:

> The trial judge determined that the board's resolution adopted at the January 18 public meeting "reaffirmed" and approved the action taken on January 11 and 12, but that the board could not "breathe life into a void act." We disagree with the trial judge's conclusion, under the circumstances of this case, that the board could not validly approve and adopt at a public meeting the action which the board had previously taken.
>
> We find no provision in the Arizona statutes relating to public meetings which precludes a public body from adopting at a subsequent public meeting action which was legally ineffective from a previous meeting of the public body. *Id.* at 468, 610 P.2d at 470.

The circumstances before us are not materially different from *Cooper*. We therefore find that the public meeting of the Livestock Board held August 30, 1979, wherein the Board readopted its August 22 resolution to dismiss plain-

tiff operated to cure the "open meeting" defect. *See also, Hokanson v. High School District No. 8 of Pima County,* 121 Ariz. 264, 589 P.2d 907 (1978).

PERSONNEL BOARD HEARING

A.R.S. § 24-621 states in relevant part:

> A. There is created the office of chief veterinary meat inspector. The board shall appoint an Arizona licensed veterinarian to fill this office, who shall have had a minimum of four years experience of meat inspection work in slaughtering establishments. His compensation shall be as determined pursuant to § 38-611 and *he shall serve at the pleasure of the board.* (emphasis added).

The key to this case is the construction and effect to be given the phrase "he shall serve at the pleasure of the board."

The Livestock Board contends the phrase renders plaintiff terminable at will by the Board, and that plaintiff is thus exempted from the Merit System by A.R.S. § 41-771, which states:

> The provisions of this article and article 6 [the Merit System] do not apply to:
>
> * * *
>
> (12) Any other position exempted by law.

The Board's argument, in short, is that since under the Merit System an employee can only be dismissed for "cause", an employee terminable at will by the terms of the statute creating the employment is thus "exempted by law" within the meaning of A.R.S. § 41-771(12). Plaintiff disagrees, contending the phrase does not operate to exempt him from the Merit System. Therefore, he contends, he can be dismissed only for "cause", and is entitled to both a Personnel Board hearing and the right to appeal

to the superior court from a decision rendered on that hearing. *See* A.R.S. §§ 41-768; 41-770; 41-785.

Plaintiff's argument relies on the following sequence of legislative events: A.R.S. § 24-621, stating the chief inspector "shall serve at the pleasure of the board", was enacted prior to the Merit System, which was adopted in 1968. As originally enacted, only eleven categories of particular employees were exempted from the Merit System; the position of chief veterinary meat inspector did not fall within any of those exempted categories. In 1970, A.R.S. § 24-621 was amended[4], but the "shall serve at the pleasure of the board" language was not altered by the legislature. In 1972, the Merit System exemption statute was renumbered A.R.S. § 41-771,[5] and amended by the addition of section (12), which provides that the Merit System does not apply to "[a]ny other position exempted by law."

Plaintiff's analysis of this legislative history is that his position as chief veterinary meat inspector should be considered to be within the coverage of the Merit System. His argument goes as follows: In 1968, former A.R.S. § 38-901[6] provided:

> In this chapter [the Merit System], unless the context otherwise requires:
>
> * * *

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[4] *See* Laws 1970, ch. 204, § 65.

[5] The original exemption statutes was former A.R.S. § 38-921. For the amendment, *see* Laws 1972, Ch. 141, § 4.

[6] *See* Laws 1968, Ch. 200, § 1. This section was amended and renumbered A.R.S. § 41-762 in 1972, *see* Laws 1972, Ch. 141, § 4, but the definitions of "employee" and "state service" remained essentially unchanged. *See* A.R.S. § 41-762(1) and (2).

> 4. "Employee" means a person hold a position in state service.
>
> 5. "State service" means all offices and positions of employment in state government except offices and positions exempted by the provisions of this chapter.

Thus, since he was, in 1968, an "employee" in "state service" and not exempt under former A.R.S. § 38-921, plaintiff was undeniably within the Merit System from 1968 until 1972. Plaintiff then argues that the fact he was in the Merit System, and therefore could *not* be dismissed other than for "cause", was inconsistent with any power to terminate him at will under the language of A.R.S. § 24-621, the earlier act. The power of the Livestock Board to terminate him at will was thus superseded or repealed by implication, since the general rule of statutory construction is that where two valid acts are inconsistent, the later act prevails. *State ex rel. Purcell v. Superior Court*, 107 Ariz. 224, 485 P.2d 549 (1971); *State v. Angle*, 54 Ariz. 13, 91 P.2d 705 (1938); *Willard v. Hubbs*, 30 Ariz. 417, 248 P. 32 (1926). Thus, he concludes, when A.R.S. § 41-771(12) was added in 1972, that section did not operate to then remove plaintiff from the Merit System, since no specific legislative intent to so exempt plaintiff's position *per se* was indicated in the amendment. In support of this contention that a specific legislative intent is needed to exempt him, plaintiff points, by way of example, to some statutes creating state employment positions enacted *after* the addition of A.R.S. § 41-771(12) which statutes provide *both* that the office holder "shall serve at the pleasure of" the appointing authority *and* "is exempt from the provisions of the state personnel [merit] system."1/

1/ *See* page 13a.

Lastly, plaintiff argues, in relation to the 1970 amendment of A.R.S. § 24-621, that since both the Livestock Board and the Personnel Division treated plaintiff as within the Merit system prior to the time of the amendment to A.R.S. § 24-621, the legislature, since it did not alter or clarify what it meant by the "serve[s] at the pleasure of" language in § 24-621, presumptively intended to adopt the prior administrative interpretations of the Livestock Board and Personnel Division that plaintiff was not exempt from the Merit System by virtue of that provision. *See Long v. Dick*, 87 Ariz. 25, 347 P.2d 581 (1959); *Mummert v. Thunderbird Lanes, Inc.*, 107 Ariz. 244, 485 P.2d 814 (1971).

The major flaw in this argument is that A.R.S. § 24-621 and its "shall serve at the pleasure of the board" mandate is *no longer in conflict* with the Merit System statutes. Although, generally speaking, where statutes are in conflict the later governs, *Willard, supra*, if a later amendment to one or the other renders the two statutes capable of being construed as consistent then a construction, which gives full effect to both should prevail. In *State ex rel. Larson v. Farley*, 106 Ariz. 119, 122, 471 P.2d 731, 733 (1970), our supreme court stated:

> The general rule is that the court may look to prior and contemporaneous statutes in construing the meaning of a statute which is uncertain and on its face susceptible to more than one interpretation. If reasonably practical, a statute should be explained in conjunction with other statutes to the end that they may be harmonious and consistent. If the stat-

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1/ *See, e.g.*, the 1976 statutes surrounding the creation of the post of the Director of Library, Archives and Public Records, A.R.S. §§ 41-1331(B) and 41-1332(C), and the 1977 statute creating the post of System Manager for the Criminal Justice Information System, A.R.S. § 41-2204.

> utes relate to the same subject or have the same general purpose—that is, statutes which are in pari-materia—they should be read in connection with, or should be construed together with other related statutes, as though they constituted one law. As they must be construed as one system governed by one spirit and policy, the legislative intent therefor must be ascertained not alone from the literal meaning of the wording of the statutes but also from the view of the whole system of related statutes. *This rule of construction applies even where the statutes were enacted at different time, and it is immaterial that they are found in different chapters of the revised statutes.* In construing the statute, endeavors should be made to trace the history and legislation on the subject in order to ascertain the consistent purpose of the legislation. (emphasis added).

Later in the same opinion, the court quotes with approval the following from *Frazier v. Terrill*, 65 Ariz. 131, 175 P.2d 438 (1947):

> On the presumption that whenever the legislature enacts a provision it has in mind the previous statutes relating to the same subject matter, it is held that in the absence of any express repeal or amendment therein, the new provision was enacted in accord with the legislative policy embodied in those prior statutes, and they all should be construed together. * * * 106 Ariz. at 123.

Furthermore, it is presumed that by amending a statute, the legislature intends to make some change in the existing law. *Sterman v. Transamerica Title Insurance Co.*, 119 Ariz. 268, 580 P.2d 729 (App. 1978). Moreover, we find the law generally to be specific that:

> A public employee serving at the pleasure of the appointing authority . . . is by the terms of his employment subject to removal without judicially cognizable good cause.

Bogacki v. Board of Supervisors of Riverside County, 97 Cal. Rptr. 657, 665, 489 P.2d 537 (1971). *Accord, Dixon v. Osman*, 22 Ariz. App. 430, 528 P.2d 181 (1974); *Ernst v. Arizona Board of Regents*, 119 Ariz. 129, 579 P.2d 1099 (1978); *State v. Jenkinson*, 222 N.E.2d 825 (Ohio App. 1966); *Naef v. City of Allentown*, 227 A.2d 888 (Pa. 1967). Thus, although A.R.S. § 24-621 and the Merit System were in apparent conflict prior to 1972, the addition of A.R.S. § 41-771(12) removed that conflict. As to plaintiff's arguments concerning administrative interpretation, we note that, although such interpretations should be accorded some weight in construing the statute, administrative interpretations are not binding on this court. *Arizona Foundation for Neurology and Psychiatry v. Sienerth*, 13 Ariz. App. 472, 477 P.2d 758 (1970).

We hold that plaintiff is exempted from the Merit System by virtue of A.R.S. § 41-771(12), since he serves at the pleasure of his appointing authority. The November 1979 and January 1980 preliminary injunctions are therefore quashed, since they are premised on the erroneous assumption that plaintiff is entitled to a Personnel Board hearing.

ADMINISTRATIVE REVIEW ACT

Plaintiff next contends that, in the alternative, he is entitled to judicial review of the decision to terminate him, pursuant to the Administrative Review Act, A.R.S. § 12-901, *et seq.* We disagree.

There is no absolute right to an appeal. That right exists only where specifically created by statute. *Smith v. Trott*, 36 Ariz. 166, 283 P. 726 (1930); *County of Pima v. State Department of Revenue, Division of Property and Special Taxes*, 114 Ariz.

275, 560 P.2d 793 (1977). A.R.S. § 12-902(A), delineating the scope of the Administrative Review Act, states:

> This article applies to and governs every action to review judicially a final decision of an administrative agency *except* the state department of public welfare, *or where the act creating or conferring power on an agency or a separate act provides for judicial review of the agency decisions and prescribes a definite procedure for the review.* (emphasis added).

Plaintiff argues that if he is foreclosed from seeking judicial review under the Personnel Board statutes, specifically A.R.S. § 41-785, due to his exemption from the Merit System under A.R.S. § 41-771(12), he must have the right to appeal pursuant to the Administrative Review Act, since statutes pertaining to the creation, powers, duties and operation of the Livestock Board do not provide for judicial review of that board's personnel decisions.[8/] Plaintiff, in order to make this argument, also contends that the Personnel Board statutes do not constitute a "separate act" providing for judicial review of the agency decision as contemplated by A.R.S. § 12-902(A), set forth above.

An argument strikingly similar to plaintiff's was made and rejected in *County of Pima v. State Department of Revenue, supra.* In that case, Pima County attempted to proceed under the Administrative Review Act when it was foreclosed from seeking review of a valuation decision of

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8/ Certain Livestock Board decisions are specifically made appealable, expressly through utilization of the Administrative Review Act, by those statutes delineating the Board's scope and powers. *See, e.g.,* A.R.S. §§ 24-621.04 and 24-621.15. It has been noted, however, that the existence of statutes providing for review of specific agency decisions means, by implication, that such review is precluded for all other decisions of the subject agency. *See, Application of Hathcock,* 9 Ariz. App. 178, 450 P.2d 419 (1969); Note, *Judicial Review of Administrative Action in Arizona,* 1975 Ariz. St. L.J. 739, 754.

the Department of Revenue, since the county was not a party permitted to seek review under the statute creating the right to appeal from such a Department of Revenue decision. The court reasoned:

> The appellants argue nevertheless that the Administrative Review Act is here pertinent because *as applied to them*, Title 42 does not provide either an avenue of appeal or a procedure for review of the Board's decision, thereby excluding them from the exception clause contained in § 12-902(A). To construe that statute in this manner, however, would not comport with the obvious legislative intent underlying § 12-902. That section was enacted to permit judicial review of administrative decisions when review of an agency's decision has not been otherwise provided for. *Knape v. Brown*, 86 Ariz. 158, 342 P.2d 195 (1959). That is not the case here where Title 42 has provided both judicial review and a definite procedure to implement the review of the Board's rulings. Clearly, § 12-902 was not intended and cannot be read to confer the right of appeal from an agency's decisions on one who has not been included among those given the right of review in the particular statutes that make such review of the agency's decisions available. Hence, the Administrative Review Act cannot confer on the appellants the authority to appeal the Board's decision to the superior court. (emphasis added). 114 Ariz. at 278, 279, 560 P.2d at 796, 797.

Plaintiff here similarly contends that, as applied to him, the Personnel Board statutes do not provide a procedure for review, therefore excluding him from the exception clause of A.R.S. § 12-902(A). We disagree for the same reasons stated above by the supreme court in *County of Pima*.

Plaintiff attempts to distinguish *County of Pima* by noting that the statute there providing for review pertained

directly to Department of Revenue decisions and was a part and parcel of the same title of laws, Title 42, prescribing the powers and procedures of the revenue department. Such a distinction, however, draws too fine a line.

It is our view that the Merit System initially encompasses *all* state personnel, and only *then* proceeds to exempt certain classes of employees from its purview. Inasmuch as A.R.S. § 41-785(D) provides a procedure whereby a state employee may ultimately gain review in superior court of an adverse Personnel Board Decision, there is a "separate act" providing for judicial review of the agency's general personnel decisions within the meaning of A.R.S. § 12-902 (A). Plaintiff here then is in much the same position as was the county in *County of Pima, supra,* since A.R.S. § 12-902 "cannot be read to confer the right to appeal from an agency's decisions on one who has not been included among those given the right of review in the particular statutes that make such review of the agency's decisions available." *Id.* at 279, 560 P.2d at 796. Plaintiff is not entitled to appeal the Livestock Board's decision to the superior court on the basis of the Administrative Review Act.

DUE PROCESS ISSUES

We must next determine whether plaintiff was entitled to a *pretermination* hearing in order to comport with due process, notwithstanding his "at will" status.

Due process procedural protections apply to the dismissal of a public employee if the employee can demonstrate a property or liberty interest in his job. *Board of Regents of State Colleges v. Roth,* 408 U.S. 564 (1972); *Dixon v. Osman, supra;* Note, *Property and Liberty Limitations on the Dismissal of Arizona Public Employees,* 1977 Ariz. St. Law Journal 835.

In light of our above determination that plaintiff's employment is "at will", it is clear that he had no property interest in his employment. No property right is involved when the individual has only an abstract need or desire for the job, rather than a legitimate claim of entitlement to that particular employment based on contract, statute, or regulation. *Dixon v. Osman, supra*; *Board of Regents v. Roth, supra.*

Plaintiff insists, however, that a *liberty* interest was involved. A liberty interest arises where the dismissal imposes upon the employee a stigma or reputational harm which forecloses furthere employment opportunities or results in significant damage to the employee's standing in the community. *Smith v. Pima County Law Enforcement Council,* 113 Ariz. 154, 548 P.2d 1151 (1976); *Cato v. Collins,* 539 F.2d 656 (8th Cir. 1976).

Initially, it is to be noted that the stigma which attaches to the mere fact of dismissal alone, or dismissal where no statement or reasons is given, does not give rise to a liberty claim. *Rottenberg v. Cartwright,* 22 Ariz. App. 473, 528 P.2d 859 (1974); *White v. Superior Court in and for County of Pima,* 25 Ariz. App. 438, 544 P.2d 262 (1975).

The threshold issue then is whether a liberty interest is involved. If not, plaintiff is not entitled to any due process procedural protections regarding his dismissal, and *no* form of hearing whether pre- or post-termination, is required. The trial court's findings of fact from the hearing on plaintiff's initial complaint indicate that the Livestock Board met on August 22, 1979, and voted to recommend plaintiff's dismissal *after discussion in executive session,* contrary to plaintiff's request. The dismissal letter was then sent to plaintiff. Since the plaintiff served at the Livestock Board's

pleasure, it could dismiss plaintiff for *any* reason not constitutionally impermissible,[2/] and, as such, was under no requirement to inform him of those reasons. *See White, supra.* The contents of the letter and the reasons for plaintiff's dismissal were not made public until after plaintiff's *request* that all discussions involving his dismissal be had in public. In *Cato v. Collins*, 539 F.2d 656 (8th Cir: 1976), the Federal District Court of Appeals stated:

> Nonrenewal of a teaching contract alone does not constitute a deprivation of an interest in liberty. If, however, the reasons for nonrenewal are announced publicly or are incorporated into a record made available to prospective employers, the reasons may affect a teacher's chances of securing another job.
>
> In this case, the record indicates that the reasons for the nonrenewal of appellant's contract were not publicized by the board nor incorporated into any employment record. The board informed appellant of the reasons for nonrenewal in a confidential letter and did not publicly announce those reasons. It was only at appellant's request that public hearings were held, where the circumstances surrounding and the reasons for nonrenewal became public information. Such disclosure of the reasons for nonrenewal at the teacher's request cannot form the basis for an interest in liberty. (cites/footnote omitted.) *Id.* at 660.

Even if a liberty interest had been involved, we do not feel plaintiff would have been entitled to a *pretermination*

2/ Constitutionally impermissible reasons for discharging a state employee would be discharge because of the employee's exercise of his First Amendment free speech rights, or his Fifth Amendment right not to incriminate himself, or a discharge involving the equal protection clause of the Fourteenth Amendment by virtue of the employee's race, etc. *See Dixon v. Osmun, supra* at 432, 528 P.2d at 183, and the cases cited therein. Plaintiff has made no allegation that his discharge was based on any such grounds.

hearing. In *City of Flagstaff v. Superior Court in and for Coconino County*, 116 Ariz. 382, 569 P.2d 812 (1977), our supreme court adopted the balancing test set forth by the Ninth Circuit in *Peacock v. Board of Regents of the Universities and State Colleges of Arizona*, 510 F.2d 1324 (9th Cir. 1975), *cert. denied*, 422 U.S. 1049 (1975), to determine whether a pretermination hearing is required. In that balance is, on the one hand, the need of the agency employer and the public for efficient operation of that agency's duties, against, on the other hand, the employee's interest in a pretermination hearing. Here, the interests of the Livestock Board and the public in maintaining a loyal and efficient operation to protect the public from the distribution of unwholesome meat products outweigh the plaintiff's interests especially where, as here, the plaintiff's only interest in a pretermination hearing is to "clear his name", since he has no right, even if all the charges are false, to retention of his old job. *See Smith v. Pima County Law Enforcement Council, supra.*

The November 9, 1979 and January 18, 1980 preliminary injunctions are quashed. The order vesting jurisdiction in the Personnel Board is reversed. The order dismissing plaintiff's claim based on the Administrative Review Act is affirmed.

LAURANCE T. WREN, CHIEF JUDGE
Division One

CONCURRING:

DONALD F. FROEB, JUDGE

JOE W. CONTRERAS, JUDGE

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

(Filed: November 13, 1979)

KENNETH McLEOD, D.V.M., Plaintiff,

v.

KENNETH CHILTON, et al., Defendant.

NO. C 393 927

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Arizona Rules of Civil Procedure 52(a), and 65(h), the Court makes the following Findings of Fact and Conclusions of Law in relation to plaintiff's request for a preliminary inunction (sic):

FINDINGS OF FACT

1. On August 22, 1979, plaintiff was dismissed from his position as Chief Veterinary Meat Inspector with the State Live Stock Sanitary Board. On August 24, 1979, Dr. McLeod filed a complaint naming as defendants members and employees of the Live Stock Sanitary Board and alleging violation of Arizona's Open Meeting Law and a violation of Dr. McLeod's due process right to a pre-termination hearing, among other things. In that complaint and in a first amended complaint alleging essentially the same causes of action, filed September 24, 1979, plaintiff has asked for equitable relief in the form of a preliminary injunction reinstating him to his position as Chief Veterinary Meat Inspector pending a determination by the State Personnel Board as to whether or not Dr. McLeod should be terminated.

2. On October 1, 1979, defendants filed a motion to dismiss or for summary judgment asking that all injunctive relief be denied, that the complaint be dismissed, and requesting attorneys fees. On October 2, 1979, and on October 9, 1979, hearings were held before this Court concerning plaintiff's request for a preliminary injunction. Following are this Court's findings of fact pursuant to those hearings.

3. On August 22, 1979, the Live Stock Sanitary Board held a hearing at which the Board voted to recommend the dismissal of Dr. Kenneth McLeod as Chief Veterinary Meat Inspector for the Live Stock Sanitary Board. Prior to that meeting, Dr. McLeod made a request that any discussions concerning his employment at the meeting be made in public pursuant to Arizona's Open Meeting Law, A.R.S. 38-431.03(A)(1) (Exhibit 4). According to the transcript of that hearing (Exhibit 3), discussion concerning plaintiff's employment were held behind closed doors despite Dr. McLeod's request to the contrary. Subsequently, the transcript reflects that a motion to dismiss Dr. McLeod was made and adopted by the Board. A letter of dismissal was then issued to Dr. McLeod.

4. On August 30, 1979, the Live Stock Sanitary Board held another meeting concerning Dr. McLeod's employment because of a possible question concerning a violation of Arizona's Open Meeting Law at the August 22nd meeting. The minutes of the August 30th meeting (Exhibit 2) reflect that the motion made at the August 22nd meeting was again made, voted upon and adopted without discussion of the conversations held behind closed doors at the August 22nd meeting. Subsequently, a second letter of dismissal was issued to Dr. McLeod.

5. Dr. McLeod has held his position as Chief Veterinary Meat Inspector for the Live Stock Sanitary Board for over 20 years. He was dismissed by the Live Stock Sanitary Board without a hearing on the charges made against him.

6. The dismissal of Dr. McLeod occurred in an atmosphere infused with allegations of scandal directed against the Live Stock Sanitary Board and carries a taint of unethical conduct on Dr. McLeod's part.

7. The charges against Dr. McLeod and the attendant dismissal from his position are causing him a loss of pay and may be causing injury to his reputation.

CONCLUSIONS OF LAW

1. The plaintiff has made a prima facie case that Arizona's Open Meeting Law, A.R.S. 38-431, et seq., was violated on August 22, 1979 when the Live Stock Sanitary Board refused to discuss the plaintiff's employment in public session pursuant to plaintiff's request under A.R.S. 38-431.03(A)(1), voiding the action taken by the Board. A.R.S. 38-431.05.

2. The meeting held on August 30, 1979 by the State Live Stock Sanitary Board did not cure the violation committed by that Board on August 22, 1979. The discussions held behind closed doors on August 22nd were not made public on August 30th. Rather, the motion made on August 22nd was simply made again and adopted on August 30th.

3. The plaintiff is entitled to retain his employment status pending a hearing on the dismissal presently scheduled before the State Personnel Board.

DONE IN OPEN COURT this 7 day of November, 1979.

/s/ Michael E. Bradford

THE HONORABLE MICHAEL E. BRADFORD
Judge of the Superior Court

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

(Filed:
November 13, 1979)

KENNETH McLEOD, D.V.M.,
Plaintiff,
v.
KENNETH CHILTON, et al.,
Defendant.

NO. C 393 927

ORDER

Pursuant to the Findings of Fact and Conclusions of Law entered by this Court in the above-entitled matter pursuant to A.R.C.P. 52(a) and 65(h):

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff be reinstated to his position as Chief Veterinary Meat Inspector of the Live Stock Sanitary Board pending a resolution of the charges made against him by said Board before the State Personnel Board.

IT IS FURTHER ORDERED that plaintiff not be dismissed from his position except pursuant to action by the State Personnel Board.

IT IS FURTHER ORDERED denying defendants' alternative motion for summary judgment and/or motion to dismiss. Defendants' motion for attorneys fees is also denied.

DONE IN OPEN COURT this 9 day of November, 1979.

/s/ Michael E. Bradford
Judge of the Superior Court

APPENDIX C

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

(Filed: Jan. 27, 1982)

KENNETH L. McLEOD, D.V.M.,
Plaintiff-Appellee-Appellant,

v.

KENNETH CHILTON, LAWRENCE BECK, ROBERT BOWMAN, DWAYNE DOBSON, DON MARTIN and KENNETH MORRISON, individually and as members of the STATE OF ARIZONA LIVESTOCK SANITARY BOARD; JOSEPH SAMSILL; WAYNE WIEKHORST, D.V.M.; and THE STATE OF ARIZONA,
Defendants-Appellants-Appellees.

1 CA-CIV 5117
1 CA-CIV 5216
1 CA-CIV 5481
1 CA-CIV 5761
(Consolidated)

DEPARTMENT A

Maricopa County
Superior Court
Nos. C-393927
C-408462

ORDER

The motion for rehearing and the response thereto were considered by the Court, Chief Judge Laurance T. Wren and Judges Joe W. Contreras and Donald F. Froeb participating.

IT IS ORDERED denying the motion.

DATED this 27th day of January, 1982.

/s/ Laurance T. Wren
LAURANCE T. WREN, CHIEF JUDGE
Division One

A true copy of the foregoing order was mailed this 27th day of January, 1982 to:

[Names and addresses of counsel for the parties as shown on the proof of service are omitted in this reproduction as is the signature of the clerk of the court affirming the service.]

APPENDIX D

SUPREME COURT

STATE OF ARIZONA

KENNETH L. McLEOD, D.V.M., Plaintiff-Appellee-Appellant, v. KENNETH CHILTON, LAWRENCE BECK, ROBERT BOWMAN, DWAYNE DOBSON, DON MARTIN and KENNETH MORRISON, individually and as members of the STATE OF ARIZONA LIVESTOCK SANITARY BOARD; JOSEPH SAMSILL; WAYNE WIEKHORST, D.V.M.; and THE STATE OF ARIZONA, Defendants-Appellants-Appellees.	(Filed: Feb. 24, 1982) Supreme Court No. 15883-PR Court of Appeals Nos. 1 CA-CIV 5117, 1 CA-CIV 5216, 1 CA-CIV 5481, 1 CA-CIV 5761 (Consolidated) Maricopa County Nos. C-393927, C-408462 (Consolidated)

The following action was taken by the Supreme Court of the State of Arizona on February 23, 1982 in regard to the above-entitled cause:

"ORDERED: Petition for Review = DENIED."

Record returned to the Court of Appeals, Division One, Phoenix, this 24th day of February, 1982.

/s/ S. ALAN COOK, Clerk

By /s/ Diana K. Bentley
Deputy Clerk

TO:

Jeremy E. Butler, Esq. Paul G. Ulrich, Esq. and Michael L. Cooper, Esq. Lewis and Roca, 100 West Washington, Phoenix, Arizona 85003

Hon. David J. Perry, Judge, Maricopa County Superior Court, 201 West Jefferson, Phoenix, Arizona 85003

Glen D. Clark, Clerk, Court of Appeals, Division One, West Wing, State Capitol Building, Phoenix, Arizona 85007

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NO. 81-2231

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

KENNETH L. McLEOD, D.V.M.

Petitioner,

v.

KENNETH CHILTON, LAWRENCE BECK, ROBERT BOWMAN, DWAYNE DOBSON, DON MARTIN and KENNETH MORRISON, individually and as members of THE STATE OF ARIZONA LIVESTOCK SANITARY BOARD; JOSEPH SAMSILL; WAYNE WIEKHORST, D.V.M.; and THE STATE OF ARIZONA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF ARIZONA DIVISION ONE

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, through the Attorney General of the State of Arizona, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Arizona Court of Appeals opinion in this case.

RESTATEMENT OF THE QUESTION PRESENTED

Whether a state employee who serves at the will of the employing state board is entitled to a *pre-termination* hearing when the reasons for his dismissal were publicized at an open meeting of the employing state board at his request.

RESTATEMENT OF THE CASE

The significant facts of this case are not in dispute and are set out in the Arizona Court of Appeals opinion at some length (Pet. 1a-8a). What is in dispute is the manner in which the petition characterizes the issues that were before the Court below.

Although the petition alleges that the Arizona Court of Appeals held that the United States Constitution does not require that McLeod be given a due process hearing (Pet. p. 4), this misstates not only the Court's opinion but the issue addressed by the Court below.

As the following discussion indicates, the petition's failure to reflect accurately what issues were before and addressed by the Arizona Court of Appeals is reason for this Court to deny the petitioner's request for certiorari.

REASONS FOR DENYING WRIT

1. *This Court lacks jurisdiction in this matter since McLeod did not raise the issue of an alleged conflict between the public's right to open board meetings and a dismissed public employee's right to a post-termination liberty interest hearing in the Court below.*

Petitioner McLeod alleges that the Question Presented raises the issue of "a direct conflict between the right of a public employee to have a hearing when dismissed for publicized defamatory reasons, with the right of the public to have meetings of its boards held open to scrutiny." (Pet. p. 5).

The problem with the Question Presented is that the alleged issue was never raised before the Arizona Court of Appeals; and, that Court did not decide this case upon the basis of an alleged conflict between policies underlying Arizona's open meeting law and McLeod's right to a liberty interest hearing.

It is settled that unless the federal question is raised and preserved in proceedings below, it cannot be raised for the first time in this Court.[1]

The petition's arguments are further flawed for failure to distinguish between pre-termination and post-termination hearing rights. Relevant portions of the Arizona Court of Appeals opinion do address the issue of whether there was a liberty interest involved in McLeod's dismissal, but this issue was addressed solely within the context of McLeod's contention that he was entitled to a *pre-termination* hearing notwithstanding his at-will employee status.

The Court of Appeals opinion turns on whether McLeod had a right to *pre-termination* hearing upon any basis. After balancing the parties' interests, the Court of Appeals held that McLeod had no right to a pre-termination hearing, even if a liberty interest had been involved. Moreover, the Court indicated that McLeod had no liberty interest, since he served at the Livestock Board's pleasure and the Board was not required to inform him of the reasons for his dismissal. The Court went on to note that those reasons were not made public until after McLeod's own request that any dismissal discussions be public (Pet. 18a-21a).

2. *The facts below do not support the Question Presented and formulated in the petition; nor can the facts support a determination of that question by this Court.*

The factual background for the petition (and the four consolidated appeals to the Arizona Court of Appeals that resulted in the opinion McLeod now seeks this Court to review) are unique to McLeod's situation (Pet. 1a-8a). Few other litigants (if any) shall be affected by a decision in this case because the matter turns on its own facts.

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1. *Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn.*, 360 U.S. 334, 342, n.7, 3 L.Ed.2d 1280, 79 S.Ct. 1196 (1959); *Cardinale v. Louisiana*, 394 U.S. 437, 438, 22 L.Ed.2d 398, 89 S.Ct. 1161 (1969); *Hill v. California*, 401 U.S. 797, 805, 28 L.Ed.2d 484, 91 S.Ct. 1106 (1971); *Taron v. Arizona*, 410 U.S. 351, 352, 35 L.Ed.2d 346, 93 S.Ct. 998 (1973).

Based upon the facts stated in the Arizona Court of Appeals opinion, the Livestock Board reviewed McLeod's dismissal in a closed meeting on August 22, 1979. On August 23, 1979, the Livestock Board provided McLeod a dismissal letter (including grounds for dismissal). McLeod filed a complaint in the Superior Court of Arizona on August 24, 1979, claiming that the Board had violated Arizona's open meeting law by reviewing his dismissal in a closed meeting against his wishes.

It was only after McLeod commenced litigation by filing the August 24, 1979 complaint against the Board that the Board readdressed his dismissal in an open Board meeting on August 30, 1979. Thus, contrary to the petition, the case deals only with an at-will state employee who chooses to have the reasons for his discharge publicized.

3. *The Arizona Court of Appeals decision below does not conflict with any decision of the United States Supreme Court or other federal appellate courts.*

The petition states at page 5 that this Court should accept certiorari because the Arizona Court of Appeals has decided important federal questions and "there is an apparent conflict" on the decided issue between two federal courts of appeals. At page 7, the petition cites these federal cases as *Cato v. Collins*, 539 F.2d 656 (8th Cir. 1976), and *Dennis v. S & S Consolidated Rural High School*, 577 F.29 338 (5th Cir. 1978). However, the Arizona Court of Appeals opinion is not in conflict with any United States Supreme Court or other federal appellate court decisions.

Further, these cited cases are not in conflict with each other. Even assuming arguendo that there is a conflict between these cited cases, that conflict should be resolved at the time a federal appellate matter is brought to this court, and not a state court decision such as this.

The *Dennis* court's opinion does not hold that it makes no difference whether the dismissal charges are aired at a public meeting held at the request of the terminated employee. Moreover, it does not appear that the parties in *Dennis* directly addressed an alleged issue of *how* the stigmatizing charges against teacher John Dennis became public. It is even more apparent that the manner in which the charges were made public was not the basis for the *Dennis* court's opinion.

This is evident from the Court's holding on page 339:

> The critical issue raised by this appeal is whether a non-tenured public school teacher with no property interest in the renewal of his teaching contract is entitled to Fourteenth Amendment due process when the school board subjects him to a badge of infamy in the course of refusing to renew his contract. We hold that he is.

It should also be noted that the petition discusses the alleged question in a manner that avoids substantial law on point. By claiming an alleged conflict between public policy interests in open meetings and a dismissed public employee's liberty interest, the petition attempts to circumvent the substantial number of decisions that indicate an employee has no liberty interest where the alleged stigmatizing matters are not made public, or publication is due solely to the employee's own actions.[2]

4. *McLeod has no standing to assert the right of the public to have board meetings open to public scrutiny.*

The petition asserts that the denial of a liberty interest hearing when employee termination reasons are discussed at requested public meetings will "invite a substantial chilling effect on First Amendment rights," since "such rulings discourage terminated employees from exercising the fundamental First Amendment right of having board actions open to public scrutiny." (Pet. p. 10)

McLeod never argued below that his own conduct requesting open meeting discussion of his dismissal was protected by the first amendment and therefore precluded the denial of a liberty interest. Now, McLeod attempts to argue the

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2. For example: *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) (no liberty interest where charges not made public); *Galaway v. Lawson*, 438 F.Supp. 968 (8th Cir. 1976) (no liberty interest where employee voluntarily publicized charges); and *Clark v. Mann*, 562 F.2d 1105 (8th Cir. 1977) and *Cato v. Collins*, 539 F.2d 656 (8th Cir. 1976) (employees requested charges be publicized).

first amendment rights of third parties whose expression allegedly shall be chilled by the Arizona Court of Appeals and the 8th Circuit. This contention is not supported by the facts of this case and McLeod has no standing to litigate the rights of third parties herein.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED this 1st day of July 1982.

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